HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

REMOTENESS OF VESTING AS THE TEST UNDER THE NEW YORK RULE AGAINST PERPETUITIES. — Professor Warren [1] recently raised three important questions as to the New York law of perpetuities. (1) If it be assumed that the Revised Statutes substituted the test of alienability for the common law test of remoteness in vesting, is there any limit to the doctrine that the power of alienation is not suspended, provided there are persons in being who can by joining convey the whole fee? [2] (2) Limitations of personalty to a class, the minimum membership of which is not necessarily determined within the statutory period, though the maximum is, have been held invalid.[3] Is this a special narrow rule,[4] or is it authority for the view that remoteness of vesting is the test, or are these cases to be treated as if in each one an invalid inalienable trust was attempted to be created, which could not be construed into an immediately vesting gift,[5] and hence the decisions actually support the alienability test, although the language of the opinions favors the opposite view? [6] (3) Is the last clause of § 40 of the Real Property Law [7] permissive or restrictive? [8]

[1] See 30 Cyc. 1501 *et seq.*

[2] *Ibid.* 1505, n. 20. Suppose a devise to A for life, then to A's widow for life provided she was in being at testator's death, then further limitations: so far there has been no suspension of alienability, since all the females living at testator's death could join in a conveyance of the fee.

[3] Greenland *v.* Waddell, 116 N. Y. 234; Matter of Howland, 75 N. Y. App. Div. 207; Schlereth *v.* Schlereth, 173 N. Y. 444.

[4] That is, for example, on the ground that a vested estate, liable to be divested, is not "alienable." See Matter of Howland, *supra*.

[5] Fargo *v.* Squiers, 154 N. Y. 250. See Robert *v.* Corning, 89 N. Y. 225.

[6] See 30 Cyc. 1507, n. 29. See *infra*, n. 14.

[7] "A fee or other less estate may be limited on a fee, on a contingency which if it should occur, must happen within the period prescribed in this article." L. 1896, c. 547,

[8] See 30 Cyc. 1518, n. 81.

These questions Professor Warren considered fundamental and still unsettled. With one sweep the Court of Appeals has recently answered them all, and purported to settle the cardinal point as to whether alienability or remoteness is the test. *Matter of Wilcox*, 194 N. Y. 288. Personalty was bequeathed in trust to pay the income to W. for life, then the income was given to W.'s issue, and an undivided share of the principal to each of said issue at the age of 21, and in default of W.'s issue attaining 21, then over to living persons. The gift over was held bad for remoteness, though the alienability of the property was not suspended beyond W.'s life. The court fastens upon the clause which lies almost hidden in § 40,[7] and construes it to establish a requirement that estates shall vest as well as become alienable within the statutory period. The principal reasons given for this construction are that the revisers were versed in the common law, which required vesting,[9] that § 40 would otherwise be surplusage,[10] and that the construction is settled by previous authority.[11] The court does not discuss the contrary authority.[12]

The main point has often hitherto been discussed, but rarely decided, for as most testamentary limitations involve a trust to collect and apply income, which is by statute inalienable even though trustee and *cestui* join in conveying,[13] most of the decisions may be cited for either view.[14] The language of the courts [12] and the writers,[15] however, except with regard to the cases which elicited Professor Warren's second question, have generally appeared to take the alienability test for granted. A notable exception was Mr. Chaplin; [16] and his reasoning the present case quotes and adopts. It may be assumed, therefore, that the court means to lay down (1) his rule, that the requirement as to vesting applies to "remainders" [17] of realty, and to all

§ 40. The other material provision is § 32: "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, etc."

From the Personal Property Law: "The absolute ownership of personal property shall not be suspended, etc. . . . limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." L. 1897, c. 417, § 2.

[9] Gray, Rule against Perpetuities, 2 ed., c. vii. *Contra*, Reeves, Special Subjects in Real Property, § 663.

[10] The answer to this argument is well stated in 9 Colum. L. Rev. 338.

[11] The cases cited are Oxley *v.* Lane, 35 N. Y. 340; Knox *v.* Jones, 47 N. Y. 389; Robert *v.* Corning, 89 N. Y. 225; Henderson *v.* Henderson, 113 N. Y. 1; Greenland *v.* Waddell, 116 N. Y. 234.

[12] Sawyer *v.* Cubby, 146 N. Y. 192; Beardsley *v.* Hotchkiss, 96 N. Y. 201; Emmons *v.* Cairns, 3 Barb. (N. Y.) 243. See also Mott *v.* Ackerman, 92 N. Y. 539; Thieler *v.* Rayner, 115 N. Y. App. Div. 626; Nellis *v.* Nellis, 99 N. Y. 505; Graham *v.* Graham, 49 N. Y. Misc. 4; Everitt *v.* Everitt, 29 N. Y. 39.

[13] Everitt *v.* Everitt, *supra*.

[14] When personalty is bequeathed on trust to pay the income to A for life, then to A's issue till 21, then to convey to the issue, or over, the court may find the title vested in A's issue at birth, an intestacy as to the income, and a power in the trustee to convey: here only the validity of the gift over, not of the gift to the issue, squarely raises the point in question. But if the title does not vest in the issue at birth, because the testator intended the trustees to keep title and make the conveyance to the remaindermen, then to hold invalid either the limitation to the issue at 21, or the limitation over, may proceed from either test, since so long as the trustee has title, the power of alienation is suspended. It results that no case till the present has ever satisfactorily presented and discussed the question.

[15] Gray, § 748; 30 Cyc. 1502; 1 Colum. L. Rev. 224.

[16] Chaplin, Suspension of Alienation, §§ 1, 384, n. 3.

[17] A "remainder" is a future estate dependent on a precedent estate. Chaplin, § 12.

estates of personalty.[16] However, several other different conclusions may be drawn from the opinion: (2) that only "remainders," whether realty or personalty, need vest within the period; other future estates need only not suspend alienability. This would perhaps reconcile the leading case on the other side.[18] (3) Or, that all future estates, of both kinds of property, are subject to the test as to vesting. This would hardly follow from § 40, which mentions only remainders of realty, but as to personalty would be the effect of what this case calls the natural sense of "absolute ownership"; as to realty would necessitate the theory that the common law (except as to the period) is in force as to estates not covered by § 40. (4) Or finally, as the court admits, the principal case on its facts may be merely one where a limitation after an invalid trust is held bad,[14] and hence the whole opinion dicta. It is needless to observe that this case, based on an obscure clause hardly before noticed, and on precedents not squarely in point, heedless of contrary authority and opinion, and careless in defining its own limits, seems unlikely to satisfy the bar of New York, however satisfactory the same result would be if achieved by legislative amendment.

CONSTITUTIONALITY OF A STATUTE REQUIRING THE SURRENDER OF UNCLAIMED BANK DEPOSITS TO THE STATE. — At common law the continued and inexplicable absence of a person from the jurisdiction for seven years was such *prima facie* evidence of death as to give the probate court jurisdiction to appoint an administrator to administer his estate.[1] But, even in a collateral suit, in the absence of statute, proof that he was alive at the time of the appointment of the administrator was sufficient to establish that the court had no jurisdiction and the administrator no authority.[2] Nor has a state power to declare by statute that a person absent and unheard of for a certain lapse of time shall be conclusively presumed to be dead so as to give a probate court jurisdiction; for this would constitute a taking of property without due process of law within the meaning of the Fourteenth Amendment.[3] But a clear distinction is drawn between the administration of the estates of absentees and of those of deceased persons; and a Pennsylvania statute[4] requiring, in addition to a reasonable presumption of death, adequate notice according to the circumstances, and reasonable safeguards for the return of the property to the absentee in case he should prove to be alive, was upheld by the Supreme Court on the ground that such administration is based primarily on the absence of the person whose estate is sought to be administered, and not upon his death.[5]

A Massachusetts statute has gone a step further.[6] It provides that the probate court shall, at the request of the Attorney-General, order that all deposits with any savings bank or trust company to the credit of depositors which have remained unclaimed for more than thirty years and for which the depositor cannot be found be paid to the state treasurer, subject to be

---

[18] Sawyer *v.* Cubby, *supra.*

[1] Wentworth *v.* Wentworth, 71 Me. 72.

[2] Griffith *v.* Frazier, 8 Cranch (U. S.) 9, 23; Jochumsen *v.* Suffolk Savings Bank, 3 Allen (Mass.) 87.

[3] Scott *v.* McNeal, 154 U. S. 34.

[4] Laws of Pa. 1885, p. 155.

[5] Cunnius *v.* Reading School, 198 U. S. 458.

[6] St. 1908, c. 590, §§ 56–57.